IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-562

HAROLD E. RANKIN, JR.,

Petitioner,

vs.

TEXACO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner Harold E. Rankin, Jr. respectfully prays that a Writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered on April 27, 1979.

OPINION BELOW

The unreported memorandum opinion of the Court of Appeals, and its order denying a petition for rehearing and rejecting a suggestion for rehearing en banc, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1979. A timely petition for rehearing en banc was denied on July 7, 1979, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In this civil case, the district court inadvertently instructed the jury that plaintiff (petitioner herein) must prove his case beyond a reasonable doubt. The court then attempted to correct its error by re-reading the instruction which

preceded and followed the erroneous one, omitting the erroneous one but not clearly and specifically directing the jury to disregard it. Later in the charge, the court gave proper instructions on plaintiff's burden to prove his case by a preponderance of the evidence. Plaintiff failed to object to the charge as given. The jury returned a verdict for defendant Texaco.

On this petition following the Court of Appeals' affirmance of the judgment, the following issues are presented:

1. Should this Court now expressly adopt the "plain error" or "fundamental error" exception to Rule 51 of the Federal Rules of Civil Procedure, applied in civil cases in every federal judicial circuit save the Ninth?

2. If so, did the district court's contradictory instructions on plaintiff's burden of proof, not corrected by a clear and specific admonition, contain such potential for prejudice that they constitute fundamental error warranting reversal?

RULE INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . ."

STATEMENT OF THE CASE

A. Procedural Background.

Plaintiff and petitioner Harold E. Rankin, Jr. (hereinafter "plaintiff"), a Texaco service station lessee-operator, brought this damage action, based on breach of contract and fraud, against defendant and respondent Texaco, Inc. (hereinafter "Texaco") for damages for failure to supply plaintiff with the necessary gasoline to maintain his

business, thus forcing plaintiff out of business. The suit was filed in the Orange County, California, Superior Court [C.R. 6] and was removed by Texaco to the federal district court pursuant to 28 U.S.C. § 1441, the district court having diversity jurisdiction under 28 U.S.C. § 1332 [C.R. 1-3, 266].

The case was tried to a jury. During the charge to the jury, the district court stated [Supp. R.T. 317:7-19]:

> "The law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt -- Excuse me.
>
> "That, ladies and gentlemen, is what I am talking about in the late hours.
>
> "Let me restate that to you, ladies and gentlemen. I just defined for you circumstantial and direct evidence.

"It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. The law makes no distinction between direct and circumstantial evidence."

The trial court then continued with the reading of the instructions, including a correct instruction that plaintiff's burden was to prove his claim by a preponderance of the evidence [Supp. R.T. 319:1-18].

It should be noted that the trial court did not expressly tell the jury to disregard the earlier instruction that the jury could not hold against the defendant unless they were satisfied of the defendant's guilt "beyond a reasonable doubt". The court merely restated the instruction regarding direct and circumstantial evidence, leaving out (without explanation to the jury) the statement of the beyond-a-reasonable-doubt standard.

The jury returned a verdict for Texaco and stated in answer to two special interrogatories that, under the instructions given them, Texaco was not liable to plaintiff for breach of contract or fraud [Supp. R.T. 343:7 to 344:8; C.R. 248]. Judgment was entered accordingly [C.R. 249].

Plaintiff's motion for new trial [C.R. 498] was denied [C.R. 251], and plaintiff appealed [C.R. 252], contending that the district court's attempt to correct its instructions did not satisfy the requirements set forth in Seltzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975), and cases cited therein. The Court of Appeals held that it could not review this alleged error because (1) plaintiff failed to object to the instructions pursuant to Rule 51, and (2) the Ninth Circuit has not adopted the plain error doctrine in civil cases. See Memorandum in Appendix hereto.

B. Statement of Facts.

Plaintiff had been in the service station business since 1964 [R.T. 110:24

to 111:16]. He had operated a Shell station and had built it to the point where he was selling over 50,000 gallons of gasoline a month, when Shell effectively increased his rent about $500.00 a month. In December 1969, plaintiff arranged with Texaco to take over and re-open a closed Texaco station on Newport Boulevard at Victoria in Costa Mesa, California (the "Newport-Victoria station") as a favor to Texaco while plaintiff waited for another station, one he particularly wanted, to become available [R.T. 134:16 to 143:13, 193:5 to 194:12, 213:17 to 217:11]. On December 18, 1969, plaintiff and Texaco executed a package of Texaco form documents, including a lease [Ex. 1], an agreement for the purchase and sale of gasoline [Ex. 2], and a gasoline storage and withdrawal (GSAW) agreement [Ex. 3] [R.T. 109:9 to 110:23]. (Although Texaco promised plaintiff he was first on the list for the other station, when the other station became available in 1970, it was given to someone else [R.T. 143:15 to 144:12, 216:25 to 217:11].)

Pursuant to Exhibit 2, Texaco was required to sell and deliver to plaintiff his gasoline requirements up to annual maximums of 450,000 gallons of Ski Chief and 270,000 gallons of Fire Chief, a total of 720,000 gallons per year or an average of 60,000 gallons per month. Plaintiff built up the Newport-Victoria station until, in the first four months of 1973, Texaco was selling him an average of over 55,000 gallons per month [R.T. 114:3-10, 115:11-14, 116:3-4].

In 1973 a worldwide shortage of crude oil and refined petroleum products was announced [R.T. 116:12-17]. On May 10, 1973 the federal government announced a voluntary program of allocation of crude oil and refined petroleum products [R.T. 116:2 to 117:2; Exs. E, F]. In general, the oil companies were requested to make available to their customers the available supplies in proportion to each customer's purchases during an earlier base period [Exs. E, F].

As it turned out, in 1973 Texaco's worldwide production of crude oil, and manufacture of crude oil into gasoline

and other products, actually exceeded its production and manufacture during 1972, and Texaco's net income increased from $820 million in 1972 to $1 billion 243 million in 1973 [R.T. 305:17 to 312:13; Ex. 25]. Plaintiff, however, did not share in this good fortune. While other Texaco retailers received 20,000 gallons a month over their allotted number of gallons [Supp. R.T. 213:10-22, 220:16-23], plaintiff, for reasons explored at the trial, was unable to obtain from Texaco the gasoline he needed to maintain his business, and was forced out of business in early January of 1974 [R.T. 159:17 to 160:16; Supp. R.T. 152:16-24, 156:4-6], losing both his investment of over $20,000.00 and the sole source of support for himself and his family [R.T. 194:17-19, 198:25 to 199:2]. Financially unable to obtain another service station, plaintiff now drives a tanker truck for a living [R.T. 171:13-17].

The central issue in this case was whether Texaco fairly and in good faith had made available to plaintiff all the gasoline it was obligated to make available pursuant to the allocation program

(see California Commercial Code §§ 2615, 1203) and pursuant to representations allegedly made by Texaco to plaintiff.

The evidence was in conflict. According to plaintiff, his sales representative at Texaco, Mari Vandenberg, told him in May 1973, after the allocation program was announced, that Texaco had all the gasoline he wanted and not to worry [R.T. 126:11-17; Supp. R.T. 98:22 to 99:1]. However, he was unable to obtain several deliveries that month and thereafter [R.T. 126:18 to 127:14, 150:4-20, 167:17-21, 268:24 to 269:15].

In meetings on November 19, 1973 and December 3, 1973 with Mari Vandenberg and her supervisor, Tom Hughes, plaintiff and Texaco tried to resolve their differences [R.T. 123:21-23, 148:1-18]. According to plaintiff, on November 19, 1973 Texaco acknowledged that plaintiff's June allocation was 27,000 gallons lower than it should have been [R.T. 149:11-17, 186:18 to 187:11], and promised that if he allowed Texaco to close a second station ("Harbor-Heil") he had acquired for his son in 1972 [R.T. 111:25 to 112:7, 218:

14-18], Texaco would transfer the Harbor-Heil allocation to his Newport-Victoria station and give him 67,000 to 68,000 gallons of gasoline in December [R.T. 148:19 to 149:1, 152:8 to 153:18]. Relying on Texaco's representations, plaintiff agreed, ordered a load of gasoline, and re-opened the Newport-Victoria station which had been closed since late October for lack of gasoline [R.T. 150:4-6 and 19-20, 153:20-25, 169:8 to 170-19]. Again, the gasoline was not delivered promptly [R.T. 154:1-15]. (Meanwhile, Texaco closed the Harbor-Heil station and tore it down [R.T. 155:2-3].)

Thereafter, in December and early January, 1974, plaintiff continued experiencing difficulties obtaining delivery of gasoline [R.T. 158:16 to 159:16] and finally, unable to meet payroll and operate his business, he was forced to close down permanently on January 7, 1974 [R.T. 159:17 to 160:16; Supp. R.T. 152:16-24, 156:4-6].

Plaintiff had not realized at first that it was Texaco, and not the federal government, which was determining the

allocations [Supp. R.T. 105:1-14]. Once he became aware, he complained to Texaco continuously that he was not being treated fairly [Supp. R.T. 118:19 to 121:14]. According to plaintiff, during the six-month period June-November 1973, Texaco failed to deliver to him 193,654 gallons to which he was entitled under the allocation program [R.T. 187:17-24; Supp. R.T. 84:12-19]. Since his net profit was about five cents a gallon [R.T. 195:18 to 196:9], his lost profits on the undelivered gasoline were $9,683.70. Further, in addition to the loss of his $20,000.00 investment, plaintiff's damages for being forced out of business were calculated over the contract period at lost profits of $332,779.00 [see Supp. R.T. 270:5-6].

In contrast, Texaco's witnesses asserted that Texaco tried to be fair and treated plaintiff the same as any other Texaco retailer [R.T. 357:5-15, 413:13-15]. Tom Hughes denied that Texaco made any errors in calculating plaintiff's monthly allocations [R.T. 342:16-21] and denied he agreed to transfer the Harbor-Heil station allocation to the Newport-

Victoria station [R.T. 343:21 to 344:15, 347:16-22, 349:9-21]. Mari Vandenberg similarly denied agreeing to transfer the Harbor-Heil allocation to Newport-Victoria [R.T. 408:5-10], and claimed that if there was any error in calculating plaintiff's allocations, it was only a "small discrepancy" [R.T. 415:6-18].

Thus the evidence was in serious conflict and the burden of proof placed upon plaintiff by the jury instructions was of critical importance.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S CONTINUED REFUSAL TO RECOGNIZE A PLAIN ERROR RULE IN CIVIL CASES CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT IN THE INTERPRETATION OF RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND RAISES AN IMPORTANT QUESTION REGARDING UNIFORM APPLICATION OF THE FEDERAL RULES.

Every federal judical circuit except the Ninth recognizes a so-called "plain

error" or "fundamental error" exception to the requirement of a timely objection to instructions under Rule 51. For representative cases from each circuit, see:

Montgomery v. Virginia Stage Lines, 191 F.2d 770, 774 (D.C. Cir. 1951);

Morris v. Travisono 528 F.2d 856, 859 (1st Cir. 1976);

Frederic P. Wiedersum Assoc. v. Nat. Homes Constr., 540 F.2d 62, 66 (2nd Cir. 1976);

Paluch v. Erie Lackawanna Railroad Co., 387 F.2d 996, 999-1000 (3rd Cir. 1968);

Edwards v. Mayes, 385 F.2d 369, 373 n. 1 (4th Cir. 1967);

Ind. Dev. Bd. of Tn. of Section, Ala. v. Fugua Industries, 523 F.2d 1226, 1237-1241 (5th Cir. 1975);

O'Brien v. Willys Motors, Inc., 385 F.2d 163, 166 (6th Cir. 1967);

Celanese Corp. of America v. Vandalia Warehouse Corp., 424 F.2d 1176 1181 (7th Cir. 1970);

O'Malley v. Cover, 221 F.2d 156, 159 (8th Cir. 1955);

Pridgin v. Wilkinson,
296 F.2d 74, 76 (10th Cir. 1961).

See also this Court's decision in Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037, 1041:

> "There may always be exceptional cases of particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below. . . .
>
> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Errors in instructing on the applicable burden of proof have generally been considered so fundamental as to warrant reversal even in the absence of proper and timely objection. Sheppard Federal Credit Union v. Palmer, 408 F.2d 1369, 1371-1372 (5th Cir. 1969) ("Burden of proof is always of major importance and, in this case where the evidence was close on the question of good faith, it was crucial."); O'Brien v. Willys Motors, Inc., supra, 385 F.2d 163, 166-167 (Sixth Circuit held law on burden of proof goes to heart of case and error must be noted despite lack of objection); Ratay v. Lincoln National Life Ins. Co. 378 F.2d 209, 212 (3d Cir. 1967), cert. den. 389 U.S. 973 (error in instruction on burden of proof was so fundamental and highly prejudicial as to justify review despite absence of proper objection).

See also Celanese Corp. of America V. Vandalia Warehouse Corp., supra, 424 F.2d 1176, 1181 (despite absence of objection below, Seventh Circuit reversed judgment for misleading character of the charge actually given on the issue of

burden of proof). Cf. Frederic P. Wiedersum Assoc. v. Nat. Homes Constr., supra, 540 F.2d 62, 66 (Second Circuit holds that contradictory, inconsistent or confusing instructions constitute fundamental error reviewable even in the absence of proper objection).

However, for the forty years since the adoption of the Civil Rules in 1938, the Ninth Circuit has refused to apply a "plain error" or "fundamental error" exception to Rule 51. Lynch v. Oregon Lumber Co., 108 F.2d 283, 286 (9th Cir. 1939); Woodworkers Tool Works v. Byrne, 191 F.2d 667, 676 (9th Cir. 1951); Persons v. Gerlinger Carrier Co., 227 F.2d 337, 343 (9th Cir. 1955); Siebrand v. Gossnell, 234 F.2d 81, 96 (9th Cir. 1956); Hargrave v. Wellman, 276 F.2d 948, 950-951 (9th Cir. 1960); Bertrand v. Southern Pacific Co., 282 F.2d 569, 572 (9th Cir. 1960), cert. den. 365 U.S. 816; Crespo v. Fireman's Fund Indemnity Co., 318 F.2d 174, 175 (9th Cir. 1963); Bock v. United States, 375 F.2d 479, 480 (9th Cir. 1967); Monsma v. Central Mutual Ins. Co., 392 F.2d 49, 52-53 (9th Cir. 1968).

The Monsma case, decided over ten years ago, was, to plaintiff's knowledge, the Ninth Circuit's last published refusal to apply the "plain error" exception in civil appeals. Shortly thereafter, Professors Wright and Miller noted that "the Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to-instruction in a civil case." 9 Wright & Miller, Federal Practice and Procedure (1971) § 2558, p. 674.

More recently, inconsistencies have appeared in the Ninth Circuit's application of its strict adherence to Rule 51. Thus in Norddeutscher Lloyd v. Jones Stevedoring Co., 490 F.2d 648 (9th Cir. 1973), the Court reversed a judgment for an instructional error, over the dissent of one judge who pointed out (at 654) that no objection had been made to the instructions as given and that in view of the Circuit's previous decisions, reversal could not be had on the basis of "plain error". Again, in Fountila v. Carter, 571 F.2d 487, 493-494 (9th Cir.

1978), the Court deemed an inadvertent error by the district court in reading the instructions to the jury to be prejudicial error although it was apparently not called to the district court's attention.

Further, it is noteworthy that the Federal Rules of Evidence, adopted by Congress in 1975, expressly include a plain error rule which applies to both civil and criminal cases. Rule 103(d) ("Nothing in this rule [governing rulings on evidence] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

Yet in the present case, the Ninth Circuit, citing Monsma, has once again declined to recognize a plain error rule. Accordingly, plaintiff respectfully suggests that the time has come for this Court to call a halt to the Ninth Circuit's march to its quite different drummer, a march which constitutes a continued "threat to the goal of uniformity of federal procedure", see Hanna v. Plumer, 380 U.S. 460, 463, 85 S.Ct. 1136,

14 L.Ed.2d 8, 12. The "proper interpretation and uniform application" of the federal rules has in the past, of course, been a matter of sufficient public importance to warrant the grant of certiorari. United States v. Schaefer Brewing Co., 356 U.S. 227, 230-231, 78 S.Ct. 674, 2 L.Ed.2d 721, 725; see also Commissioner v. Bilder, 369 U.S. 499, 501, 82 S.Ct. 881, 8 L.Ed.2d 65, 67; Goldlawr v. Heiman, 369 U.S. 463, 465, 82 S.Ct. 913, 8 L.Ed. 2d 39, 41; Hickman v. Taylor, 329 U.S. 495, 497, 67 S.Ct. 385, 91 L.Ed. 451, 455.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

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